

# **Exhibit 1**

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Via Email

Re: Anticipated Motion to Compel in Kent v. PoolTogether, Inc..

Dear Kevin and Behn,

Thank you for getting back to us about the date that PoolTogether changed its website to add the terms-and-conditions language upon wallet connection. As we can now agree, our client connected his wallet before that change was made. It's a strange coincidence how close in time the two events were, but that happens sometimes.

The remainder of your email puzzled us. You write that the relevant change was not applicable only to wallet connection, but rather that "those terms [i.e., some sort of affirmative assent or acknowledgement] are presented at various stages of a user's interaction with the interface, including at the time of deposit or transfer." To the extent you mean to say that on October 20 the website changed so that users were affirmatively acknowledging some sort of assent to terms upon deposit, that is not accurate. Indeed, there's a mountain of evidence showing it's not right.

First and foremost is a screen-recording video of our client depositing of \$10.00 on October 22, 2021 UTC. (You can find all videos mentioned in this letter in links in a postscript.) It shows him clicking the "deposit GUSD" button, entering an amount and continuing, confirming the deposit in his wallet (which is maintained by a third-party and thus could not have presented PoolTogether terms), and then seeing the message that the deposit was successful. Nothing like what you say ought to have been presented was.

That is not the only evidence that there is no user assent to terms during the deposit process. Last night (after you sent your December 20 message), an investigator in our office transferred money to PoolTogether and recorded the process. No terms and conditions language appeared. The linked folder also collects publicly shared videos posted to YouTube from after October 20, 2021, of other users going through the

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deposit process. No message indicating assent to terms is ever presented in any of the screen recordings. A video from October 14, 2021, shows a user going through the whole process—wallet, deposit, and all—and seeing no terms.

Unless we are overlooking something—and please tell us what specific message you referred to in your email if there is something specific that we are missing—the evidence is overwhelming that our client was not presented with any acknowledgment or request to assent to terms upon deposit on October 22. Combined with the agreed-upon evidence—which you were good enough to share—that our client was not presented with any such terms when he connected his wallet on October 19, it's clear he never affirmatively assented to or acknowledged any terms of use that possibly could have required arbitration.

Given that, we hope you'd agree that a motion to compel arbitration in this case would be frivolous. It would have to be based solely on the presence of terms and conditions linked in small type at the bottom of a website that our client did not even visit to purchase his tickets. Courts have uniformly held that this type of presentation of terms does not create a valid contract to arbitrate, even where (contra here) that presentation happens via the same URL. *See, e.g., Specht v. Netscape*, 306 F.3d 17, 23 (2d Cir. 2002) (refusing to enforce terms of use that “would have become visible to plaintiffs only if they had scrolled down to the next screen”). Should you file a motion to compel arbitration on that basis, we will respond with not only an opposition but also a motion for sanctions.

We thus believe the best course of action would be for you to write a letter to Judge Block recognizing that there was a factual misunderstanding and explaining that you will not be filing a motion to compel. That said, if you agree that you have no viable motion to compel, we can represent as much in our responsive letter to the court. I suspect Judge Block would appreciate that the pre-motion letter process accomplished its objective.

Sincerely,

Charlie Gerstein  
December 21, 2021



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P.S. Links to and descriptions of evidence:

Aug 30: Video of a wallet link and then deposit on or about August 30, 2021. At no stage in the process are “Terms of Service” shown, including at the wallet link (approximately 3:13 in the video) or the deposit (approximately 3:22-3:40) Available: <https://drive.google.com/file/d/1OCCi-AOBWJ2DSDUonlHtDQaZFNJOpOIr/view?usp=sharing>

Oct 14: Video of a wallet link and then deposit on October 14, 2021 at about 01:19 PM UTC. At no stage in the process are “Terms of Service” shown. Available: <https://drive.google.com/file/d/1cAr2LBpFlpfZrxv5YL8VdPEkQw1VaccU/view?usp=sharing> and timing documentation available here: [https://drive.google.com/file/d/1iCLpP\\_k2jOTMm7OSjU7FsFwzKg2qYyT/view?usp=sharing](https://drive.google.com/file/d/1iCLpP_k2jOTMm7OSjU7FsFwzKg2qYyT/view?usp=sharing)

October 21: Arecording of Kent’s actual deposit process shows that no “Terms of Service” were presented. Available: <https://drive.google.com/file/d/1IItmge-nlJXILEJvPF1KhCYM4ipSI5L1/view?usp=sharing>

October 28 (or about): Video of a wallet link and then deposit on or about October 28, 2021. “Terms of Service” language is visible when the wallet is linked (approximately 4:16 in the video) and no “Terms of Service” language is ever again visible, including during the deposit process (approximately 9:57-11:33 in the video.) Available: <https://drive.google.com/file/d/1LAhRMmuJup2ezGKuSyvOgDWqNvUHgt3k/view?usp=sharing>

December 20: On the evening of December 20, a video recording of a wallet link and then deposit shows that “Terms of Service” language is visible at the wallet link but no “Terms of Service” language appears ever again, including during the deposit process. Available: <https://drive.google.com/file/d/1gGjv8FaQIgpoo7R2zlvahOiqC4-OoTyi/view?usp=sharing>